

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN**

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**CHARLES GABBY,  
Plaintiff,**

**v.**

**Case No. 04-C-0476**

**GARY MAIER, M.D.,  
DR. LUY, SHARI HEINZ,  
SUSAN KOON, JOHN DOES 1-3  
and UNKNOWN,  
Defendants.**

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**ORDER**

Plaintiff Charles Gabby, who at all times relevant to this action was incarcerated at Fox Lake Correctional Institution, lodged this pro se civil rights action pursuant to 42 U.S.C. § 1983 alleging various violations of his constitutional rights. On February 14, 2005, he was permitted to proceed in forma pauperis on claims under the Equal Protection Clause of the Fourteenth Amendment, the Eighth Amendment, and the Americans with Disabilities Act (ADA). Currently before me is defendants' third motion for summary judgment.<sup>1</sup>

Defendants filed the summary judgment motion on May 16, 2007, six weeks before the close of discovery.<sup>2</sup> Fed. R. Civ. P. 56(f) provides that when a party, in response to a motion for summary judgment, submits an affidavit showing that it "cannot present facts essential to justify its opposition," a court may deny the summary judgment motion. In the

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<sup>1</sup> I previously denied defendants' first motion for summary judgment because I found plaintiff exhausted his administrated remedies and second motion for summary judgment for defendants' failure to comply with Fed. R. Civ. P. 56(e) and Civ. L.R. 56.1 (E.D. Wis.).

<sup>2</sup> I reopened discovery in this case on May 2, 2007, after plaintiff, proceeding pro se until March 2007, retained counsel. The new discovery period lasted eight weeks, and closed on July 3, 2007.

present case, plaintiff submitted with his response to defendants' motion an affidavit stating that he was still awaiting certain discovery materials from defendants that would have information relevant to the arguments made on summary judgment, and he was therefore unable to appropriately respond to defendants' arguments until discovery was complete.

In light of the statements in the affidavit, I find it appropriate to deny defendants' motion for summary judgment without prejudice at this time to allow plaintiff to file any relevant additional materials obtained through discovery. Plaintiff shall serve and file these materials by **April 21, 2008**. Defendants will have until **May 6, 2008** to reply to any supplemental materials filed by plaintiff. After that time, I will revisit defendants' summary judgment motion; defendant need not file any new summary judgment motion.

**IT IS ORDERED** that defendants' third motion for summary judgment is **DENIED WITHOUT PREJUDICE** in accordance with this order.

Dated at Milwaukee, Wisconsin this 28 day of March, 2008.

/s

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LYNN ADELMAN  
District Judge